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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

Federal Communications Commission
Office of Secretary

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In the Matter of)

Amendment of the Commission's Rules to)

Permit Flexible Service Offerings in)

Commercial Mobile Radio Services)

WT Docket No. 96-6

REPLY COMMENTS OF OMNIPOINT CORPORATION

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Omnipoint Corporation ("Omnipoint"), by its attorneys, replies to comments filed regarding the Commission's Further Notice¹ in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

As Omnipoint stated in its comments, the term "mobile services" is defined in Section 153(27)(C) of the Communications Act of 1934, as amended ("the Act"), and includes all services offered through the use of licensed personal communications services ("PCS").² Other parties are in agreement with Omnipoint's reading of the Act.³

State regulation of a PCS operator's fixed services offered across multi-state MTA and BTA licensing areas would substantially frustrate the federal regulatory goals and mandates for

¹ In the Matter of Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, First Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 96-6, 11 FCC Rcd. 8965, 61 Fed. Reg. 43721 (Aug. 26, 1996) ("Further Notice").

² 47 U.S.C. §153(27)(C) ("the term 'mobile service' . . . includes . . . any service for which a license is required in a proceeding entitled 'Amendment to the Commission's Rules to Establish New Personal Communications Services' (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding.").

³ See, e.g., Comments of US West at 3-4; Comments of AT&T Wireless at 7-8.

PCS, such that state regulation should be preempted.⁴ The Commission should maintain its primary jurisdiction over licensed broadband PCS, even as the licensee deploys fixed applications.

There are several reasons why preemption of state regulation should remain in effect. First, PCS networks do not differentiate between fixed applications, which would be state regulated, and mobile applications, which would be exempt from state regulation. As discussed in Omnipoint's comments, differing regulations would require PCS operators to track and separate calls from fixed and mobile locations. PCS networks are not designed to track calls in this manner, and imposing such a system on the providers would require PCS operators to re-design their entire network. In fact, any mobile end-user can convert to a fixed application through the use of CPE (*e.g.*, docking cradle) without the PCS operator's knowledge. Second, subjecting fixed services to a jumble of conflicting state regulations would impede the introduction of new, competitive fixed and mobile offerings. While customers might desire bundled fixed and mobile services, PCS providers would be discouraged from providing them because bundling would create cost allocation problems and could put a PCS providers' mobile offerings at the risk of state regulation. Finally, since the federal and state aspects of PCS are inseverable and the service is primarily interstate in nature, state regulation is preempted under the Act. PCS services, offered in multi-state MTA and BTA service areas, do not follow state boundaries. To require PCS operators to track intrastate calls for state regulatory purposes would require them to undertake the arduous task of dismantling their MTA and BTA-based networks and building entirely new networks based on state boundaries.

⁴ Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 374 (1986).

The overwhelming majority of private industry participants to this proceeding agreed with Omnipoint that the states should be preempted from regulating fixed PCS on one or more of these enumerated grounds.⁵

DISCUSSION

I. "Mobile Services" Include Any Service Offered Pursuant to a PCS License

As Omnipoint explained in its comments, the Act defines "mobile services" to include *all* services offered through the use of licensed PCS.⁶ The New York Public Service Commission ("New York PSC") correctly notes that the Section 332(c)(3) preemption is limited to "mobile service" offerings.⁷ However, the New York PSC goes on to provide its own shortened version of the definition of "mobile services" and left out one important provision, subsection (C), which specifically includes "*any service* for which a license is required in a personal communications service."⁸ When the statute is read and applied in its entirety, as it must be, it is clear that all licensed PCS, whether mobile or fixed, is subject to uniform regulatory treatment under Section 332.⁹ Thus, all broadband PCS services are regulated primarily by the Commission, pursuant to its pro-competitive policies established over the past four years, and states are expressly prohibited from either rate or market entry regulation.¹⁰

⁵ See, e.g., Comments of the Cellular Telecommunications Industry Association at 5; Comments of US West at 2; Comments of Motorola at 3-4; Comments of the Rural Cellular Association at 3-5; Comments of BellSouth at 2-3.

⁶ 47 U.S.C. §153(27)(C).

⁷ Comments of the New York PSC at 2.

⁸ 47 U.S.C. §153(27)(C) (emphasis added).

⁹ We note that the Public Utilities Commission of Ohio ("PUCO") acknowledges that "mobile services" includes broadband PCS. See, Comments of PUCO at 2.

¹⁰ The Telecommunications Act of 1996 establishes further restraints on state or local market entry barriers. See, 47 U.S.C. 253(d) (FCC shall preempt state or local barriers to market entry). Significantly, the 1996 Act affirms the Section 332(c) preemption of state regulation. *Id.* at § 253(e).

II. All Broadband PCS Should Be Regulated Under Section 332

Pursuant to Section 332 of the Act, fixed PCS should be subjected to state regulation only when and if the fixed service becomes a "replacement for land line telephone exchange service."¹¹ The majority of other commenting parties agreed.¹²

The comments of New York PSC, PUCO, and the National Association of Regulatory Commissioners ("NARUC"), however, articulate arguments that misapprehend the federal scheme of CMRS regulation. Omnipoint believes that the Commission should retain its current regulatory structure and continue to regulate PCS, whether fixed or mobile applications, under Section 332 of the Act.

A. PCS, Either Fixed Or Mobile, Should Not Be Regulated As An Extension of the Intrastate LEC Network

Both PUCO and NARUC make sweeping generalizations that the Commission has never before regulated fixed CMRS offerings. For example, PUCO contends that this Further Notice represents a significant departure from the Commission's prior determination that "fixed wireless services should not be classified as CMRS and would remain subject to local jurisdiction."¹³ By the same token, NARUC alleges that the Commission has "historically" excluded services that are solely fixed in nature from the statutory definition of mobile services.¹⁴ Both parties support this argument by vaguely citing paragraph 38 of the Second Report and Order.¹⁵

¹¹ 47 U.S.C. §332(c)(3).

¹² See, e.g., Comments of Bell Atlantic NYNEX Mobile at 3; Comments of BellSouth at 3; Comments of Pacific Telesis Group at 2; Comments of Sprint Spectrum at 5 - 7; Comments of AT&T Wireless at 2.

¹³ Comments of PUCO at 3.

¹⁴ Comments of NARUC at 3.

¹⁵ In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1424-1425, at ¶38 (1994) ("Second Report and Order").

Of course, as noted in the Further Notice (at ¶ 48), ancillary fixed services offered by CMRS providers were never regulated by the states because such services "fall within the statutory definition of mobile service." The Commission has provided considerable flexibility in clarifying what services meet the "ancillary-to-mobile" test.¹⁶ Thus, the position of NARUC and PUCO that the Commission has "historically" classified fixed CMRS services as subject to state regulation is simply inaccurate. Instead, the Commission raises in this proceeding the issue of first impression of whether non-ancillary fixed services should be regulated in the same fashion under Section 332 of the Act as services that are perceived as more mobile CMRS applications.

Prior to the August, 1996 adoption in the First Report of the more permissive PCS services definition that includes fixed services, the Commission did not and properly could not have decided the regulatory classification of such services. Thus, PUCO and NARUC misunderstand the issue in this proceeding when they argue that the Second Report and Order, which was decided in 1994, somehow constrains the Commission's decision here. Moreover, their reference to paragraph 38 of the Second Report and Order, which determined that satellite services and BETRS were not "mobile services" subject to CMRS regulation, also fails to support their arguments. The regulatory classification of satellite services is inapplicable to the terrestrial CMRS issues raised in this proceeding and, in any event, does not in any way support state jurisdiction.¹⁷ More important, the significant differences that exist between BETRS and broadband PCS call for an entirely separate regulatory regime.

¹⁶ See, e.g., Letter of Regina M. Keeney, Chief, Wireless Telecommunications Bureau to A. Thomas Carroccio (November 5, 1994). ("links connecting PCS base stations and other network operations facilities; transmission of PCS network control and signaling information; and facilities linking users' premises to PCS networks" fall within the meaning of ancillary fixed uses of PCS spectrum). In the Matter of Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, First Report and Order and Second Notice of Proposed Rulemaking, ET Docket No. 94-32, 10 FCC Rcd. 4769, 4781 (1995) ("wireless local loop service could be provided in spectrum allocated for broadband PCS in the 1850-1990 MHz band").

¹⁷ For reasons stated in Omnipoint's comments and in Part I, above, the Commission's decision to classify satellite platforms as "fixed" is inapplicable to the issue of the classification of broadband PCS.

BETRS is essentially an extension of the wireline service provided by the incumbent local exchange carrier ("LEC") in a non-competitive local exchange market, and so it is properly regulated as such. As the Commission has explained, the purpose of BETRS radio loops is to "take the place of (expensive) wire or cable to remote areas. It is intended to be an extension of intrastate basic exchange service."¹⁸ Not only is the service intended as an extension of the wireline monopoly, as opposed to a competitive entrant service, the BETRS eligibility rules limit the service to incumbent LECs that are licensed by the state to provide wireline basic exchange telephone service.¹⁹ "[P]rior State certification or permission is necessary because of the basic exchange nature of the service."²⁰ Obviously, the BETRS service is intrastate because the incumbent LEC's wireline service is intrastate. The BETRS station-by-station licensing approach adopted by the Commission further adds to its local, intrastate nature. 47 C.F.R. § 22.709(b).

Broadband PCS, either fixed or mobile, could not be more different from BETRS. Broadband PCS is intended to inject new competition and promote a rapid national wireless network. To promote this goal, Congress exempted PCS from state rate and market entry regulation so that providers could roll out their service quickly and provide a viable competitive alternative to existing incumbent monopolies in telecommunications, such as cellular and wireline LEC service. While BETRS functions as an extension of the incumbent LEC, PCS was meant to compete against that LEC. Thus, also unlike BETRS, there are few eligibility restrictions for PCS providers so that new entrants can offer consumers an alternative to the incumbent provider. The broadband PCS Block C and F entrepreneurs' licenses further this pro-

¹⁸ In the Matter of Basic Exchange Telecommunications Radio Service, Report and Order, CC Dkt. No. 86-495, 3 FCC Rcd. 214, 217 (1988) ("BETRS Order").

¹⁹ 47 C.F.R. §22.702.

²⁰ BETRS Order at 217.

competitive public policy goal by ensuring new opportunities in PCS for small businesses.

Significantly, the Commission adopted multi-state MTA and BTA license areas to "promote the rapid deployment and ubiquitous coverage . . . follow[ing] the natural flow of commerce,"²¹ to "spur competition,"²² and to "allow licensees to tailor their systems to the natural geographic dimensions of PCS markets."²³ Significantly, 41 of the 46 MTA license areas in the continental U.S. include the territory of more than one state. The Commission's auction process encourages operators to establish networks that cover several multi-state BTA and MTA areas: "the values of most broadband PCS licenses will be significantly interdependent because of the desirability of aggregation across . . . geographic regions."²⁴ Multi-state MTA service areas fulfill Congressional goals for PCS regulations to "encourage competition and provide services to the largest number of people." 47 U.S.C. § 332(a)(3). MTA service areas also fulfill Congressional objectives for the rapid introduction of PCS to the American public, and to "advance a seamless national network."²⁵ Finally, and in further contrast to BETRS, the Commission licenses PCS on a wide-area basis, and "[a]pplications for individual sites are not required and will not be accepted," 47 C.F.R. § 24.11(b), further emphasizing that broadband PCS is regulated according to the multi-state MTA and BTA license areas.

Given the inherent differences between BETRS and broadband PCS in terms of public interest goals, eligibility, licensed service areas, and licensing approach, it is readily apparent that

²¹ Memorandum Opinion and Order, GN Dkt. No. 90-314, 9 FCC Rcd. 4957, 4986 (1994).

²² Id. at 4987-88.

²³ Second Report and Order, GN Dkt. No. 90-314, 8 FCC Rcd. 7700, 7732 (1993).

²⁴ Fifth Report and Order, PP Dkt. No. 93-253, 9 FCC Rcd. 5532, ¶ 31 (1994).

²⁵ 1993 Omnibus Budget Reconciliation Act, § 6002(d); H.R. Rep. No. 103-111, at 261. Thus, the argument of the New York PSC (at 2) that fixed CMRS is "local by nature" ignores the interstate nature of the essentially interstate broadband PCS licensing and service structure.

the Commission's treatment of BETRS has no bearing on its decision to regulate broadband PCS under Section 332. Rather, PCS, mobile or fixed, is an interstate CMRS service.

B. Congress Intended To Regulate LECs and CMRS Providers Differently

Both PUCO and GTE contend that it would be unfair to regulate PCS providers offering fixed wireless services differently than LECs. Specifically, PUCO believes that fixed mobile service providers should be subject to the same state regulations as the LECs to prevent the ILECs from deploying their entire wireline service base over their CMRS spectrum to avoid Title II regulatory classification.²⁶ Omnipoint believes that this concern is speculative, at best, and that competitive non-LEC PCS providers should not be subjected to state-by-state regulation simply to avoid this imputed ILEC concern. If the Commission finds this to be a valid concern on the part of the state utility commissions, it should address this incumbent wireline LEC issue more narrowly.

Even more disturbing is the contention that it is competitively unfair to regulate incumbent LECs differently than other providers of telecommunications services.²⁷ For very good reasons, Congress has decided that disparate regulatory approaches, which focus on opening up competition from the clutches of the incumbent, are exactly what the market needs to *further* competition. Section 251 of the Act, for example, provides that incumbent LECs, like the ones that have raised this issue here, are subject to far more regulatory scrutiny than any other provider. Because of their monopoly hold on the local loop, Section 271 also restricts RBOC entry into inter-LATA services until they have made a sufficient showing that the vestiges of their monopoly which pervade the current market are affirmatively undone. Given that these providers control nearly all of today's local exchange service, it is the height of hubris to suggest

²⁶ Comments of the PUCO at 5.

²⁷ Comments of GTE at 3; Comments of Bell Atlantic at 3.

that a CMRS operator entering the market without a single customer could possibly unfairly compete against them.

Omnipoint similarly disagrees with PUCO's statement that if fixed wireless services were reclassified as CMRS, CMRS providers would "realize all of the deregulatory benefits and freedoms inherent in the 1996 Act. . .but none of the associated obligations."²⁸ This assertion is simply not true. CMRS providers are "telecommunications carriers" under Section 251(a) of the Act²⁹, they are subjected to certain Title II regulation³⁰, and Part 20 and 24 of the Commission's rules. PUCO states that its only interest in regulating fixed CMRS service is to prevent "undue discriminatory pricing or pricing below cost" to the detriment of local customers.³¹ However, CMRS operators are already under a federal Title II obligation not to discriminate unreasonably.³² Furthermore, since PCS operators are the new entrants in a highly competitive market, the possibility of "pricing below cost" is extremely unlikely because after expending billions of dollars to purchase spectrum and meet the Commission's buildout requirements, PCS providers could not afford to price below cost. Finally, the Second Report and Order makes it clear that the Commission will continue to monitor the pricing of CMRS.³³ In sum, PUCO presents no specific public interest reason for regulation of fixed CMRS services by the states.

28 Comments of PUCO at 4.

29 47 U.S.C. §251(a).

30 Second Report and Order at ¶197 (CMRS operators are subject to the provisions of 47 U.S.C. §201(b), which provides that any unjust or unreasonable charge, practice, classification, or regulation is unlawful).

31 Comments of PUCO at 5.

32 47 U.S.C. §201(b).

33 Second Report and Order at ¶194.

C. Nothing In The 1996 Act Amendments Altered The Regulatory Treatment of CMRS Providers

Omnipoint disagrees with NARUC's argument that the 1996 Amendments to the Communications Act of 1934 somehow changed the definition of mobile services. NARUC speaks generally of the "1996 revisions to the definition of 'mobile'."³⁴ Nowhere in the Act was this definition changed. To the contrary, Section 253(e) dictates that the state preemption requirements found in Section 332(c)(3) remain in place with the passage of the Amendments.³⁵ In addition, NARUC's claim that Section 610 somehow affects Section 332(c)(3) is also untrue. That section refers only to the Amendments of the 1996 Act, not the original Communications Act. As such, the Act, as amended, retains the definition of PCS and the Section 332 preemption that had been in effect prior to the passage of the 1996 Amendments.

III. The Commission's Proposed Rebuttable Presumption Impedes The Rapid and Full Deployment of Fixed Services

Omnipoint reiterates that broadband PCS--whether fixed or mobile--is a CMRS service that is not subject to state regulation, except as provided in Section 332 of the Act.

Omnipoint and several other commenters³⁶ also believe that the Commission's proposal for a rebuttable presumption that fixed service will be regulated as mobile service would add significant uncertainty and the risk of a flood of litigation to CMRS fixed services offerings. As a practical matter, these risks will stifle the innovative offerings of CMRS that combine mobile and fixed applications for "one stop shopping" for the American consumer. Moreover, with MTAs and BTAs overlapping several states, a single provider could well be subject to a host of

³⁴ Comments of NARUC at 5.

³⁵ 47 U.S.C. §253(e).

³⁶ Comments of US West at 6; Comments of PCIA at 11; Comments of CommNet at 2; Comments of AirTouch at 6-7.

conflicting regulations that retard any fixed service offering at all. The timely and cost prohibitive process of state-by-state certification, rate regulation, and regulatory oversight will certainly prevent some small business Block C and F providers from even engaging in a competitive fixed service. For these same reasons, Omnipoint objects to the suggestions of PUCO and the New York PSC that the PCS operator should bear the burden of proving that its fixed wireless service should be reclassified as CMRS.

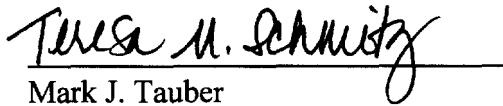
CONCLUSION

Federal regulation of fixed wireless offerings will encourage innovative new services by giving providers a federal regulatory framework that is consistent and pro-competitive. State regulation of broadband PCS, by contrast, would conflict with the Communications Act and would impose disparate regulatory requirements and uncertainty that could well end the promise of these innovative services before they even get to the market.

Respectfully submitted,

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